

Algorithm-based discrimination at work

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Algorithm-based discrimination at work

- Should we be afraid of algorithms and more generally of Artificial Intelligence?
- What discrimination can be generated by an algorithm?
 - Do they have any specific features?
- What are the legal tools to fight against these discriminations?
 - Are the current tools appropriate and sufficient?

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As a preamble

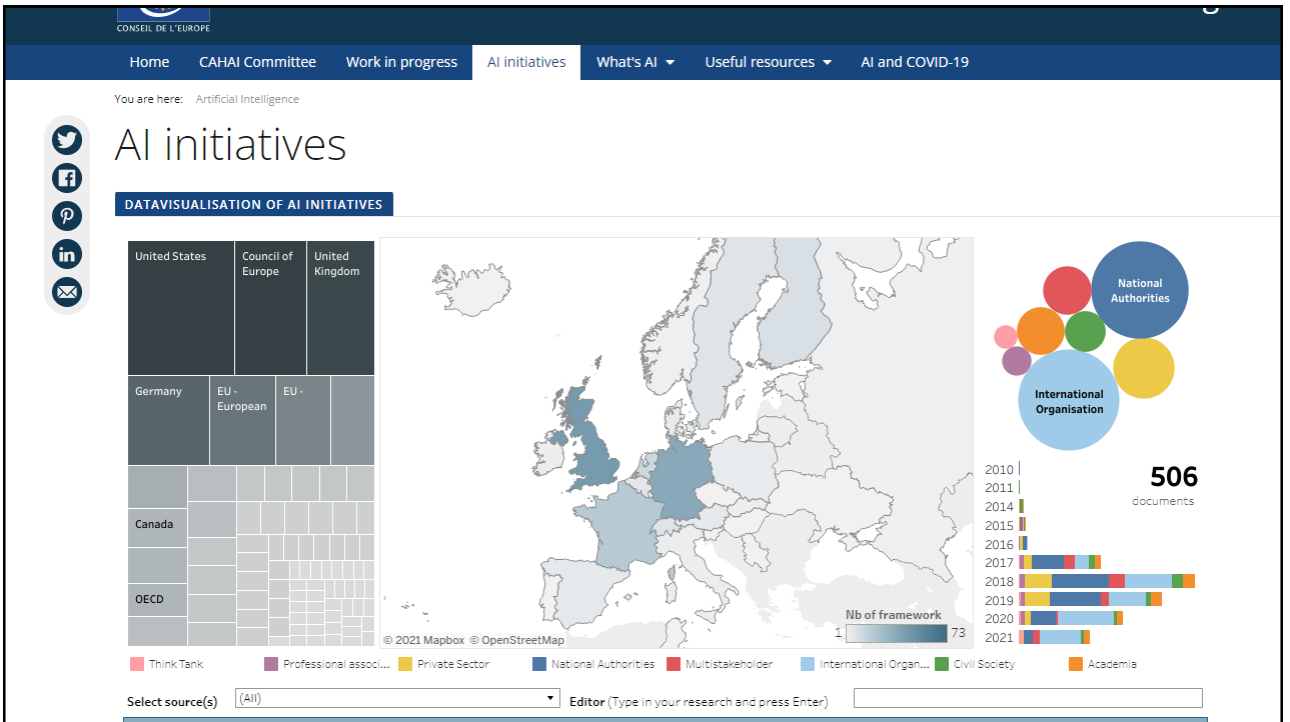
- Can an algorithm be discriminatory?
- There is already a large body of literature documenting the risk of discrimination by algorithms, often in the more general context of debates around artificial intelligence
- Since the end of the 2010s, the initiatives of various international organizations have multiplied

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I. What discrimination?

- To answer this question, it is necessary to determine what uses algorithms have in labour relations
- What is an algorithm?

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- Sources: <https://www.coe.int/en/web/artificial-intelligence/national-initiatives>
- <https://www.coe.int/en/web/artificial-intelligence/work-in-progress>

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Some definitions

- "Strictly speaking, an algorithm is the description of a finite and unambiguous sequence of steps (or instructions) to obtain a result from elements provided as input. For example, a cooking recipe is an algorithm for obtaining a dish from ingredients" (CNIL Report, Dec. 2017, https://www.cnil.fr/sites/default/files/atoms/files/cnil_rapport_garder_la_main_web.pdf)
- "Finite suite of formal rules (logical operations, instructions) allowing to obtain a result from input elements. This suite can be the object of an automated execution process and rely on models designed through machine learning" (Glossary of artificial intelligence, Council of Europe, <https://www.coe.int/en/web/artificial-intelligence/glossary>)

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- The use of algorithms as an aid to decision making is not new, what is new is the mass of information that can now be processed and the speed of processing
- The increasing complexity of algorithms generates categorizations of algorithms
- What algorithms in labour relations? What is the reality of their use?

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What consequences does the use of AI generate?

- At the macro level, the development of AI may lead to an evolution of work itself.
 - What will work be like tomorrow? How can we support workers?
 - Isn't AI likely to reinforce structural inequalities in the labour market?
- New forms of work organisation with the development of work platforms (which does not necessarily lead to a change in the work itself)
- What about algorithmic management of labour relations in companies?
 - A transformation of recruitment procedures? Career management?

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The discriminatory risk produced by the algorithm

- The algorithm cannot work without information: the quality of the information depends on the quality of the algorithmic answers
- Designers' biases
- Non-representative information bases (problem of small panels in companies)
- The risk of discrimination generated by the use of proxies
 - See the decision of the Court of Justice Test Achat, 1 March 2011, C-236/09

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Existing instruments

- Regulation, 2016/679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Point 75 of the preamble: "The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data; where personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal convictions and offences or related security measures; where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular of children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects.

European non-discrimination law

- Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
- Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation